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IN THE

Supreme Court of the United States

October Term, 1970

No. 1062

FIELDS PRODUCTIONS, INC.,

Petitioner,

v.

UNITED ARTISTS CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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December 4, 1970

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Petitioner Fields Productions, Inc., plaintiff-appellant below, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered on September 8, 1970, which affirmed a judgment and order of the United States District Court for the Southern District of New York, dismissing the complaint as insufficient on its face on the ground that petitioner had no standing to bring a treble damage antitrust suit for injuries alleged to have resulted from respondent's block booking, a practice con-

deemed by this Court in *United States v. Loew's, Inc.*, *supra*, 371 U.S. 38, as a form of tying arrangement that violates Section 1 of the Sherman Act, 15 U.S.C. §1.

Opinions Below

The opinions of the Court of Appeals and of the District Court, which are not yet reported, appear in the Appendix.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on September 8, 1970. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. Does the owner and producer of a better film have standing to maintain a treble damage antitrust action against the distributor of the film for damages alleged to have been caused by the distributor's block booking of the film?

2. Was it proper for the Courts below to have dismissed the complaint when it appears from the facts alleged that petitioner was injured "by reason of anything forbidden in the antitrust laws" (Clayton Act, Sec. 4, 15 U.S.C. §15)?

3. Was the denial of standing here inconsistent with prior decisions of this Court which give injured persons standing to sue under the antitrust laws?

Statutory Provision Involved

United States Code, Title 15:

§15. Suits by persons injured; amount of recovery.

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Statement of the Case

In November, 1962 this Court, in *United States* v. *Loew's, Incorporated*, 371 U.S. 38, *supra*, found that block booking, the practice of respondent ("United Artists") and other distributors of motion pictures in conditioning the sale or licensing of motion pictures to television stations upon the purchase of one or more unwanted or inferior pictures, violated Section 1 of the Sherman Act, 15 U.S.C. §1, and prohibited the recurrence of such practices. In so doing, the Court recognized that one of the anti-competitive effects of block booking was to restrict the sale in the market place of better films, and to transfer the revenues that they would earn in the absence of block booking to less desirable films.

On January 16, 1968, petitioner ("Fields") filed its complaint against United Artists, alleging losses in revenues caused by United Artists' block booking in the tele-

vision market of "Happy Anniversary", a better picture produced and owned by Fields, and distributed by United Artists.

The District Court dismissed the complaint, holding, on the supposed authority of *Loew's, supra* (its reliance on this case will be shown to have been completely misplaced), that only television stations and other distributors of films for television exhibition had standing to sue for damages caused by a distributor's illegal block booking, and that Fields, as the owner of a better picture, lacked such standing to sue United Artists, the distributor of its picture. The Court of Appeals affirmed on the District Court's opinion.

The complaint* alleged that Fields, the independent producer and the owner of the copyright of the motion picture "Happy Anniversary", had entered into agreements in 1956 with United Artists, a major distributor of motion pictures, under which the latter assisted in financing the production of the picture and was given the exclusive right to distribute it to all media.

In 1964, shortly after it had been enjoined from further block booking in the distribution of films to television in *Loew's,*** *supra*, United Artists began to market "Happy Anniversary", a prime attraction not previously televised,

* The complaint is reproduced at pp. 4-14a and the supplemental amended complaint at pp. 69-81 of the Appendix filed with the Court below. Count II of the complaint, alleging a pendant claim for breach of contract, was withdrawn by Fields with United Artists' consent and was not passed upon by the District Court or the Court of Appeals.

** The final decree on remand from this Court was entered on January 24, 1963, United States District Court, Southern District of New York, Civil Action 119-288.

to television stations. Between 1964 and 1966, United Artists agreed to license the telecasting of "Happy Anniversary" to approximately 96 television stations, without the consent or prior knowledge of Fields. In each instance United Artists block booked "Happy Anniversary" with one or more of thirty-nine other pictures that were included in a package of forty pictures called "Showcase II," almost all of which were either of inferior quality or were not wanted by stations because of previous exposure on television. In no case was "Happy Anniversary" sold alone to any of the 96 stations. (Court of Appeals Appendix, pp. 6-7.)

It is alleged that United Artists employed the device of block booking in violation of the decree in *Loew's, supra*, for the purpose of restricting free competition in the market that existed for the sale of "Happy Anniversary", in order to obtain for itself excessive licensing fees for the inferior pictures at the expense of the revenues "Happy Anniversary" would have earned but for the illegal block booking (Court of Appeals Appendix, pp. 6, 76-7). United Artists was entitled to retain for itself nearly all of the proceeds derived from the higher pricing of the inferior films, while under its agreement with Fields, the latter was entitled to nearly all of the proceeds of the licensing of "Happy Anniversary".*

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* After deduction of its distribution fee (25%) and expenses, United Artists was entitled to retain the first $650,000 of the proceeds of "Happy Anniversary", Fields the next $300,000, anything above that to be divided 80% to Fields and 20% to United Artists. When United Artists began television distribution of the picture, it had already received its $650,000, from theatrical exhibitions, but Fields had not yet received any of the $300,000.

It appears that the stations which agreed to license the "Showcase II" package were located in only 96 of the approximately 240 United States markets in which a total of some 522 stations were located, as the lower Court found in *Loew's, supra.* 189 F. Supp. 373, 382 (1960). "Happy Anniversary" was not sold at all in well over 100 of these markets.

United Artists reported to Fields that it obtained a total sales price from the licensing of the "Showcase II" package of $4,616,432, from which it "allocated" $196,495 to "Happy Anniversary" (Court of Appeals Appendix, p. 63). On this basis, Fields alleged that it suffered a loss in revenues of at least $650,000, representing the fair value of "Happy Anniversary's" television rights, by reason of United Artists' purposeful block booking.

Prior to the filing of the complaint, United Artists had refused to permit Fields to examine the exhibition contracts under which "*Happy Anniversary*" was *licensed*, to disclose the prices which it offered and received for "Happy Anniversary" and to account to Fields for the amounts due from such sales (Court of Appeals Appendix, pp. 11-12).

Additional information, comprising only some of the contracts and correspondence relating to the alleged block booking and some of United Artists' internal memoranda dealing with the method of arriving at the licensing fee for each picture to be stated in the exhibition contracts, was obtained only after the complaint was filed, when Fields moved for the production of records. These records disclosed that,

in marketing "Happy Anniversary" to television stations, United Artists first fixed the price at which the entire package of pictures would be licensed, and then unilaterally and arbitrarily and without negotiating with the station, advised the station of the price of each picture to be stated in the contract. The price of each picture was not based on factors related to its desirability (age, artistic quality, acceptance by theatrical audiences, previous television exposure, etc.), but on the size of United Artists' interest in the picture. Further, it appeared that "Happy Anniversary" was block booked not only as part of "Showcase II", but with from twenty-five to over three hundred additional pictures, with aggregate additional licensing fees amounting to not less than $3,125,000 (Court of Appeals Appendix, pp. 64-66).

After the dismissal of the complaint, the District Court also denied Fields' motion, based upon a fuller legal and factual specification of United Artists' block booking made possible by the limited discovery just described, for an order vacating the judgment of dismissal or for leave to file a supplemental amended complaint.*

* Reproduced at pp. 69-81 of the Appendix filed in the Court of Appeals.

Reasons for Granting the Writ

A. A Conflict Between the Second and the Ninth Circuits Requires Resolution by this Court.

The District Court's decision, adopted and affirmed by the Court of Appeals, denied standing to Fields on the ground that, as the owner and producer of a better film, it could not have been injured by block booking engaged in by the film's distributor, United Artists. The Court held that only television stations or other distributors were in the "target area" of the alleged block booking and could be so injured. The Court also held that the damages resulting to Fields from United Artists' block booking were "incidental" rather than "direct", and that the "cause" of the alleged antitrust injury was that Fields "was not allocated a fair share of the total receipts from the block," which "may be a breach of contract, but it is not a violation of the antitrust laws".

Those same grounds were urged and unanimously rejected as "specious" by the Ninth Circuit on October 20, 1970 in *Mulvey* v. *Samuel Goldwyn Productions*, —— F. 2d ——, 1970 CCH Trade Cases p. 89,448, ¶73,361 (9th Cir. Oct. 20, 1970). In *Mulvey*, the Circuit Court reversed the dismissal by the District Court of a Sherman Act claim which was in all essential respects the same as that alleged by Fields. The plaintiff, Mulvey, had sold to the defendant's predecessor his interest in five motion pictures for a price to be determined by the net receipts generated by Goldwyn's distribution of the pictures. Mul-

vey was to receive 82½% of the net receipts generated by the films' distribution up to a maximum of $1,300,000. By reason of the block booking, Mulvey alleged, he received only $740,800, rather than an amount more nearly approximating the maximum. Fields was in precisely the same position as Mulvey, even though it remained the owner of "Happy Anniversary", for its revenues depended entirely upon receipts obtained by United Artists as its marketing agent.

In *Mulvey*, the Ninth Circuit held that the anticompetitive effects of block booking created injury to the owner of a better film, and that such an owner accordingly had standing to sue the block booker (CCH 1970 Trade Cases, p. 89,450):

> "Block booking enables a distributor to obtain greater revenue from less desirable films by forcing an exhibitor who desires other films to take the entire package. An exhibitor who refuses to accept the less desirable films will be denied the films of greater worth. Block booking thereby enhances the market value of those films of lesser intrinsic merit. If exhibitors refuse to accept the entire package, the revenue normally generated by the more desirable films will be substantially reduced.
>
> Goldwyn directed his activities at the means of distributing films in order to affect their individual revenue-producing potentials—the target area. Mulvey's films are within this target area. Consequently, it is entirely foreseeable that Goldwyn's block booking could impair the profit potential of Mulvey's films, thus depreciating the value of Mulvey's contractual interest in the films' revenue."

Fields urged in the Courts below that United Artists' block booking had the same anticompetitive effect in the

marketing of "Happy Anniversary" with the same injury to Fields, as were found in *Malvey, supra*. United Artists' block booking prevented television stations which refused to accept the less desirable films in the block from buying "Happy Anniversary" at all, as illustrated by the fact that "Happy Anniversary" was not sold to over 300 television stations located in over 100 of the approximately 240 markets which the District Court in *Loew's, supra*, found were available for the purchase of films for television. Fields also urged that the revenues of "Happy Anniversary" were substantially reduced in the 96 markets where it was sold only as part of a block because United Artists, a party in *Loew's, supra*, violated the *Loew's* decree which required it to "individually list, separately price, offer for sale and sell for television each motion picture", as alleged (Court of Appeals Appendix, p. 78). This was the gravamen of Fields' claim.

The Court below, however, was of the opinion that the more direct cause of Fields' injury was that it did not receive its "fair share of the total receipts from the block", which "may be a breach of contract" which "would seem to be plaintiff's proper remedy" in the State Court action then pending. But the breach of contract action contemplated by the Courts below could not have compensated Fields for those many instances where block booking prevented "Happy Anniversary" from being sold in over 100 markets, or where the proceeds of the block booking did not include additional revenues that "Happy Anniversary" would have generated had its distributor not violated the *Loew's* decree. In those cases there would be no proceeds to "allocate", "fairly" or otherwise.

More importantly, just as in *Mulvey*, the only wrong of which Fields complained was block booking. It is just as immaterial here that the block booking may also have constituted a breach of contract as it was in *Mulvey*, where the Court said (CCH 1970 Trade Cases, p. 89,449):

> "It is immaterial that block booking was or was not a breach of contract. Successful maintenance of an antitrust suit does not depend upon the availability or nonavailability of a common-law remedy for that wrong."

Thus, in *Mulvey* it was properly recognized that where damages are claimed to flow in part from an antitrust wrong and in part from a non-antitrust wrong, then, while damages from the antitrust wrong may be diminished accordingly, nevertheless the antitrust suit cannot be dismissed solely because the non-antitrust wrong may have contributed in part to the claimant's damages. For, as the Court in *Mulvey* recognized, where there are issues relating to the presence and relative weight of competing causes of damage (CCH 1970 Trade Cases, p. 89,450, footnote, Supreme Court citations omitted):

> "It would be a rare case indeed in which such questions could be resolved as a matter of law."

The conflict between Circuits as to the test by which standing is to be determined, now presented so sharply in the conflict between *Mulvey* and the present case, has been developing for some while. Judge Waterman, dissenting in *Billy Baxter, Inc.* v. *The Coca-Cola Co. and Canada Dry Corp.*, —— F.2d ——, CCH 1970 Trade Cases p. 89,199,

¶73,307 (2d Cir. Aug. 25, 1970),* reviewed its development at length, and pinpointed its causes (at pp. 89,205-89,206):

> "* * * in deciding whether a plaintiff has standing to pursue the federally created cause of action codified in 15 U.S.C. §15 it seems to me that perhaps the use by courts in antitrust opinions of inherited decisional labels may have obfuscated the positions of some plaintiffs so as to have denied them the recoveries which fact-analysis might have indicated they should have obtained."

The developing conflict described by Judge Waterman, involving a number of Circuits, but especially the Second and the Ninth, is now ripe for resolution by this Court. As yet, this Court has not yet had the occasion to pass on the propriety of the "target area" and "direct-incidental" test for standing, or to consider its relation to "the basic policy considerations that give the standing-to-sue requirement viability" (Judge Waterman, dissenting in *Billy Baxter, supra*, 1970 CCH Trade Cases, p. 89,206). In a single decision referring to the test, the Court rejected the result, however. Where the lower Court had found that the appellant, as the sole stockholder of his corporation, was "only *incidentally* injured by a violation * * *" as a "bystander who was hit but not aimed at, * * *", this Court said that he "* * * was no mere innocent bystander; he was the principal victim of the price discrimination practiced by Standard." *Perkins* v. *Standard Oil Co.*, 395 U.S. 642, 649 (Emphasis by Court).

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* In *Billy Baxter*, cited by the Court below in support of its decision, the plaintiff, a franchisor of the right to bottle soft drinks, was not allowed to sue the defendant bottlers for injuries caused by their antitrust violations simply because it was not a bottler itself, and was thus injured, in the Court's view, only indirectly, through its franchised bottlers.

B. The Decision in *Fields*, Unlike that in *Mulvey*, Is Inconsistent with the Decisions of This Court.

It was held in the present case, on the express authority of *Loew's*, *supra*, that block booking did not injure Fields, the owner of a better film that was block booked, but only injures "television stations who are compelled to accept motion pictures that they do not want" and "other distributors who are deprived of an opportunity to license their pictures to television stations who have been forced to accept defendant's pictures". This view was rejected in *Mulvey*, *supra*, 1970 CCH Trade Cases at p. 89,450, and is contrary to this Court's decisions on block booking.

In *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131, adopted by this Court in *Loew's*, see 371 U.S. at pp. 46-47, the fact that block booking stood to injure the owner of the copyright of the better, tying film was explicitly recognized. Thus, in analysing the economic effects of block booking, the Court said (334 U.S. at p. 158):

> "It is said that reward to the author or artist serves to induce release to the public of the products of his creative genius. But the reward does not serve its public purpose if it is not related to the quality of the copyright. Where a high quality film greatly desired is licensed only if an inferior one is taken, the latter borrows quality from the former and strengthens its monopoly by drawing on the other. The practice tends to equalize rather than differentiate the reward for the individual copyrights. Even where all the films included in the package are of equal quality, the requirement that all be taken if one is desired increases the market for some. Each stands not on its own

> footing but in whole or in part on the appeal which another film may have."

Nor is there anything in *Loew's, supra*, which has changed the criteria for determining the adequacy of a complaint and those who are entitled to sue for treble damages set forth by this Court in *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U.S. 219, 235:

> "These are whether the allegations disclose a restraint and monopolistic practices of the types outlawed by the Sherman Act; whether, if so, those acts are shown to produce the forbidden effects upon commerce; and whether the effects create injury for which the recovery of treble damages by the petitioners is authorized."

In *Mulvey* the Court tested the complaint by these criteria. Had the Court below done so, as urged by Fields, it would have found, on the authority of *Loew's* and *Paramount, supra*, that block booking as an anticompetitive device was likely to injure the owner of a better film, as was recognized in *Mulvey*.

Instead, the Courts below asked and answered whether Fields was a distributor of films to television or a television station, and not whether Fields was a victim of the forbidden practice, as required by decisions of this Court.

For, as stated in *Mandeville, supra*, the Sherman Act (334 U.S. at p. 236):

> "* * *does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. Nor does it immunize the outlawed acts because they are done by any of these. *Cf. United States* v. *Socony-*

> *Vacuum Oil Co.*, 310 U.S. 150; *American Tobacco Co.* v. *United States*, 328 U.S. 781. The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated."

In *Radovich* v. *National Football League*, 352 U.S. 445, 453-454, the Court said:

> "Congress has, by legislative fiat, determined that such prohibited activities are injurious to the public and has provided sanctions allowing private enforcement of the antitrust laws by an aggrieved party. These laws protect the victims of the forbidden practices as well as the public."

See also *Perkins* v. *Standard Oil Co.*, 395 U.S. 642, 649, *supra*, and *Simpson* v. *Union Oil Co.*, 377 U.S. 13, 16. A construction of Section 4 of the Clayton Act, 15 U.S.C. §15, which would ignore the question whether plaintiff is a victim and read into the statute an arbitrary restriction on who may sue would be an unequal and thus unconstitutional application of the law. *Karseal Corporation* v. *Richfield Oil Corporation*, 221 F.2d 358, 365 (9th Cir. 1955).

It would seem from their reliance on *Billy Baxter*, *supra*, and *SCM Corporation* v. *Radio Corporation of America*, 276 F.Supp. 373 (S.D.N.Y. 1967), *aff'd* 407 F.2d 166 (2d Cir. 1969), *cert. den.* 395 U.S. 943, that the Courts below failed to recognize Fields as a victim of block booking because, for some reason not explained in the opinions, they felt that Fields was removed from the wrongdoer and was only injured derivatively as were the plaintiffs in those cases. But, in fact, no one stood between Fields, as the owner of the film, and United Artists, as Fields' marketing

agent for that film, so that Fields bore the full impact of United Artists' block booking, the sole means by which United Artists was to obtain greater revenues for its inferior films in which it had a greater stake, at the expense of Fields' revenues.

Moreover, if the Court below had followed the tests laid down by this Court in *Mandeville, supra*, and in numerous other decisions, it could not have dismissed the complaint at the pleading stage as a matter of law on the ground that Fields could not possibly have been injured at all by reason of the alleged block booking. In view of the causal allegations of the complaint and this Court's recognition in its block booking decisions that the device can injure the owner of a better film, it cannot be held that the complaint was "wholly frivolous" or that "nothing can be extracted from this bill that falls under the Act of Congress" (Holmes, J., in *Hart v. B. F. Keith Vaudeville Exchange*, 262 U.S. 271, 274). Furthermore, as this Court has made clear, Fields was not required in its treble damage complaint to exclude any cause other than block booking as contributing in some way to its injury. As was said in *Perma Life Mufflers Inc. v. International Parts Corp.*, 392 U.S. 134, 143-4:

> "Under §4, plaintiff must show not only that the defendant violated the antitrust laws but that his conduct caused the damages alleged in the complaint. Normally, it would be enough with respect to causation if the defendant 'materially contributed' to plaintiff's injury, *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 702 (1962); or 'substantially contributed, notwithstanding other factors contributed also,' *Momand v. Universal Film Exchanges, Inc.*, 172 F. 2d 37, 43 (C.A. 1st Cir. 1948), *cert. denied*, 336 U.S.

967 (1949). The plaintiff need not show that the illegality was a more substantial cause than any other. *Haverhill Gazette Co.* v. *Union Leader Corp.*, 333 F. 2d 798, 805-806 (C.A. 1st Cir.), *cert. denied*, 379 U.S. 931 (1964)."

The complaint here completely satisfied this Court's rule stated in *Radiant Burners* v. *People's Gas L. & Coke Co.*, 364 U.S. 656, 660:

> "* * * to state a claim upon which relief can be granted under that section [Section 1 of the Sherman Act, 15 U.S.C. §1], allegations adequate to show a violation, and, in a private treble damage action, that plaintiff was damaged thereby are all the law requires."

The questions of causation presented here are questions of fact to be resolved at trial, "after all the facts are in", *Radovich* v. *National Football League*, *supra*, 352 U.S. at p. 454. See also *J. I. Case Co.* v. *Borak*, 377 U.S. 426, 431.

Lastly, to deprive the owner of a better film of standing to sue his distributor for damages caused by block booking conflicts with the Congressional purpose of Section 4 of the Clayton Act, 15 U.S.C. §15, as found by this Court, which said in *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, *supra*, 392 U.S. 134, 139:

> "* * * that the purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws."

Here, the anticompetitive devices charged were practiced in violation not only of the clearest possible pronouncements of this Court but of a decree binding on the wrongdoer himself. The decree in *Loew's* (January 24, 1963, United States

District Court, Southern District of New York, Civil Action 119-288), which closely followed this Court's opinion, 371 U.S. at pp. 53-54, by its terms prevents these evils, and affords the independent producer the protection he needs. It not only prohibited United Artists from block booking in general terms but from:

> "Selling or licensing, or offering to sell or license, the right to exhibit feature films over television stations, except in the following manner: (1) each picture offered or sold shall be individually listed, separately priced and offered or sold picture-by-picture, without discrimination in price or terms or conditions of sale between competing stations; and (2) defendant shall sell or license such film or films as a station may seek to purchase or license at the defendant's offered prices, subject however to the proviso [relating to then pending negotiations] contained in paragraph IV (A) hereof."

But the action of the Courts below has nullified the decree and this Court's decisions prohibiting block booking as far as the independent producer is concerned. By denying the latter access to the Federal Courts, the Courts below have disregarded the controlling decisions of this Court summed up in *Radovich* v. *National Football League*, *supra*, 352 U. S. at pp. 453-454:

> "Petitioner's claim need only be 'tested under the Sherman Act's general prohibition on unreasonable restraints of trade', *Times-Picayune Publishing Co.* v. *United States*, 345 US 594 (1953), and meet the requirement that petitioner has thereby suffered injury. Congress has, by legislative fiat, determined that such prohibited activities are injurious to the public and has provided sanctions allowing private enforcement of the antitrust laws by an aggrieved party. These laws

protect the victims of the forbidden practices as well as the public. *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.* 334 US 219, 236 (1948). Furthermore, Congress itself has placed the private antitrust litigant in a most favorable position through the enactment of §5 of the Clayton Act. *Emich Motors Corp.* v. *General Motors Corp.* 340 US 558 (1951). In the face of such a policy this Court should not add requirements to burden the private litigant beyond what is specifically set forth by Congress in those laws."

The independent producer, who does not have his own nation-wide distribution system as United Artists and the other majors do, is a principal victim of block booking. He is forced to use a major distributor as his marketing agent because, without the latter's organization, his picture will not have access to the market at all. If the distributor can block book with impunity, using the independent producer's better picture as a tying product, then his access to the market is only illusory, for his picture cannot receive the reward due to its merits which it would receive in a free market.

Allowing only competing distributors and television stations standing affords no redress at all to a victimized independent producer, and may be of little value to enforcement in general, as well. Competing distributors, many of whom were found guilty of block booking together with United Artists in *Loew's, supra,* do have free access to the market. Television stations, compelled to buy a certain amount of fungible programming material in any event, could not care less whether they buy inferior film from one block booker rather than another in order to get the scarcer commodity, the prime attractions offered by the better pic-

tures. (Research discloses only one case of a television station suing a distributor for block booking, *Pape Television Co. v. Associated Artists Pro. Corp.*, 277 F.2d 750 (5th Cir. 1960), *reh. den.* 279 F.2d 217 (5th Cir. 1960), and none by one distributor against another.)

Entirely apart from the injustice such a situation works on the individual producer who has fallen victim to a distributor's block booking, if stations and distributors do not choose to sue, and producers are arbitrarily denied access to Court, enforcement in the Second Circuit of the *Loew's* decree by way of private action may become non-existent, thus "seriously undermining the usefulness of the private action as a bulwark of antitrust enforcement", *Perma Life, supra*, 392 U.S. at p. 139.

It is respectfully submitted that, in the circumstances of the present case, Fields, as was said in *Radovich, supra*, 352 U.S. at p. 454, "is entitled to an opportunity to prove his charges."

Conclusion

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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December 4, 1970

Appendix

Opinion and Order, McLean, U.S.D.J., November 28, 1969

Defendant moves for judgment on the pleadings dismissing this private treble damage antitrust action. The question is whether plaintiff has standing to sue.

The complaint, which is deemed to be true for the purposes of this motion, can be briefly summarized. In September 1956, defendant agreed to finance and distribute a motion picture produced by plaintiff. The agreement provided in substance that defendant would not "block book" the picture, *i.e.*, it would not require an exhibitor, as a condition of obtaining a license to exhibit plaintiff's picture, to agree to accept a license for other pictures distributed by defendant. In breach of this agreement, defendant did block book plaintiff's picture in licensing it for exhibition on television. Defendant received $4,616,432 from licensing a block of forty pictures, including plaintiff's. Defendant "arbitrarily allocated" to plaintiff's picture the sum of $196,495 as its share of the total. This sum was at least $400,000 less than the fair value of the television rights in plaintiff's picture. Defendant's block booking violated the antitrust laws and also contravened a decree entered by this court against defendant in 1963 in a government antitrust suit, *United States* v. *United Artists Corporation*, Civil Action No. 119-288. By reason of defendant's unlawful conduct, plaintiff has been damaged in the sum of at least $400,000, which is to be trebled, so that plaintiff is entitled to recover $1,200,000 plus costs and attorney's fees.

I wrote at some length on the subject of standing to sue in private treble damage actions in *SCM Corporation* v.

Radio Corporation of America, 276 F. Supp. 373 (S.D.N.Y. 1967), *aff'd* 407 F.2d 166 (2d Cir. 1969), *cert. denied*, 395 U.S. 943 (1969). It is unnecessary to repeat all that I said there. In essence, the principle is that in order to have standing to sue for damages sustained "by reason of" defendant's violation, the injury which plaintiff suffered must have been direct rather than incidental. Plaintiff must have been in the "target area" of the violation.

It is clear that the block booking of motion pictures for exhibition on television contravenes Section 1 of the Sherman Act.

> *United States* v. *Loew's Incorporated*, 371 U.S. 38 (1962)
>
> *See also United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131 (1948)

Block booking is a form of tying agreement. The reason that a tying agreement violate Section 1 is that it injures buyers and competitors of the seller. As applied to licensing motion pictures, this means that the block booking injures the television stations who are compelled to accept motion pictures that they do not want and it also injures other distributors who are deprived of an opportunity to license their pictures to television stations who have been forced to accept defendant's pictures.

> *United States* v. *Loew's Incorporated*, 371 U.S. at 45

It is thus the television stations and the other distributors who are in the "target area". If the block booking in fact causes any injury to the producer of the pictures which are thus block booked, that injury is only incidental.

Moreover, in this case it is difficult to see how the block booking could have caused injury to plaintiff, incidental or not. Plaintiff's grievance seems to be that it was not allocated a fair share of the total receipts from the block. The cause of plaintiff's damage, therefore, was the improper allocation, not the block booking. This may be a breach of contract, but it is not a violation of the antitrust laws. Plaintiff is already suing defendant for breach of contract, initially in this court and now in the state court. That would seem to be plaintiff's proper remedy. I can see no justification for trebling any damages to which plaintiff may be entitled.

Defendant's motion is granted.

So ordered.

Dated: November 28, 1969

s/ Edward C. McLean
U.S.D.J.

Opinion and Order, McLean, U.S.D.J., January 12, 1970

In its proposed "supplemental amended complaint", plaintiff has introduced various allegations in an effort to make it appear that plaintiff is a competitor of defendant and hence that plaintiff has suffered a direct injury from defendant's alleged block booking. In my opinion, plaintiff and defendant are not competitors within the meaning of the rule of *United States* v. *Loew's Incorporated*, 371 U.S. 38, 45 (1962). Plaintiff and defendant are not competing distributors of motion pictures. The fundamental fact continues to be, despite the added verbiage, that plaintiff granted to defendant the exclusive right to distribute plaintiff's picture and that what plaintiff is really complaining about is that defendant did not pay plaintiff its fair share of the proceeds of that distribution. The proposed new allegations are not sufficient to transform a claim for breach of contract into a treble damage antitrust action.

Motion denied. So ordered.

Dated: January 12, 1970

s/ Edward C. McLean
U.S.D.J.

Opinion of United States Court of Appeals For the Second Circuit

No. 739—September Term, 1969.

(Argued June 15, 1970 Decided September 8, 1970.)

Docket No. 34539

FIELDS PRODUCTIONS, INC.,
Plaintiff-Appellant,

v.

UNITED ARTISTS CORPORATION,
Defendant-Appellee.

Before:

ANDERSON and FEINBERG, *Circuit Judges*, and MANSFIELD, *District Judge.**

Appeal from an order dismissing for lack of standing a private treble damage antitrust suit in the United States District Court, Southern District of New York, Edward C. McLean, *Judge*. Affirmed.

HERMAN ODELL, Esq., New York, N. Y. *for Plaintiff-Appellant.*

PAUL MARTINSON, Esq., New York, N. Y. (Phillips, Nizer, Benjamin, Krim & Ballon and David G. Miller, Esq., New York, New York, on the brief), *for Defendant-Appellee.*

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* Of the Southern District of New York, sitting by designation.

PER CURIAM:

The judgment of the District Court is affirmed on the opinion of Judge McLean filed on May 27, 1969, Docket No. 68 Civil 198. See also *Billy Baxter, Inc.* v. *The Coca-Cola Co. and Canada Dry Corp.*, —— F.2d —— (2 Cir. August 25, 1970).